Evidence Ordinance, but as it is not, I am bound by section 43 to exclude it. This allegation too must be struck out of the pleadings.

As to the plaintiff's application for leave to deliver interrogatories, I grant it as I consider that the interrogatories are, in the words of Order 31 rule 2, necessary for disposing fairly of this case and for saving costs except that the words "and was fined $150" in the first interrogatory be deleted. In *Griebart* v. *Morris* (5), Bankes L.J. at page 664 says:

> " There are.....two objects of interrogatories, one to obtain an admission and thus to support the interrogating party's case, and the other to destroy the opponent's case."

The interrogatories proposed to be delivered satisfy the first test. Bankes L.J. went on at the same page:—

> " There are however two well-known limitations upon the right to interrogate. It is not permissible to deliver interrogatories which are of a 'fishing' character or which seek to obtain the names of the opponent's witnesses."

Here neither of these limitations applies.

As regards costs, the plaintiff shall pay the costs of the defendants' application. The costs of the plaintiff's application shall be costs in the cause.

Order accordingly.

Solicitors: *Triptipal Singh; Cheang Lee & Ong.*

GULWANT SINGH v. ABDUL KHALIK

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.)
January 14, 1963]

[K.L. — F.M. Civil Appeal No. 47 of 1962]

Moneylending — Memorandum and promissory note — Execution of — Defendant denying having received amount specified in memorandum — Trial judge making contradictory statements in reviewing evidence — Retrial — Moneylenders Ordinance, 1951.

Evidence — Contradictory statements by trial judge in reviewing evidence — Course to be followed by appellate court in such cases.

The plaintiff and the defendant executed a memorandum under section 16 of the Moneylenders Ordinance and a copy thereof and a promissory note and its copy before an advocate and solicitor. The plaintiff alleged that the debt was $2,500. The defendant in his defence denied that he received $2,500. In his judgment the trial judge stated: "As to the capital Miss Lim, her clerk P.W.3 and the plaintiff P.W.2 all stated that in fact $2,500, the amount stated in the document, was handed over to the defendant in Miss Lim's presence. She so certified in the promissory note P.I." The learned judge then went on to say: "I do not think Miss Lim and her clerk lied to the Court. Having accepted P.W.1's evidence as true,..... in my view it is quite probable that though $2,500 was in fact paid to the defendant in Miss Lim's presence,... $500 of the capital must have been returned by the defendant to the plaintiff."

Held: there was nothing on the record to support the finding of the trial judge. In view of the contradictory statements in the judgment of the trial judge and on the authority of the judgment of Lord Justice Mackinnon in *Vowles* v. *Armstrong-Siddeley Motors Ltd.* (1) at p. 802 there should be a retrial.

Case referred to:—

(1) *Vowles* v. *Armstrong-Siddeley Motors Ltd.* [1938] 4 All E.R. 796.

COURT OF APPEAL.

S. D. K. Peddie for the appellant.

K. Chelvanayagam for the respondent.

Barakbah J.A. (with whom **Thomson C.J.** and **Hill J.A.** agreed): This is an appeal against the decision of Suffian J. dismissing the claim of the appellant (plaintiff) with costs.

The brief facts are that on 26th March, 1959 the plaintiff and the defendant executed four documents before P.W. 1, an advocate and solicitor of the firm of Bannon & Bailey, Kuala Lumpur. The documents were a memorandum under section 16 of the Moneylenders Ordinance, 1951 and its copy and a promissory note and its copy.

The plaintiff alleged that the debt was $2,500 as stated in the promissory note and that the defendant made payments only in September, November and December, 1960 and in January, 1961 of $100 each. There was a balance of $2,925 including interest still due and the plaintiff filed a claim for that amount. Since filing this suit defendant paid another $100 in February, 1961. All these payments were made through plaintiff's solicitors, Messrs. Bannon & Bailey.

The plaintiff's evidence was supported by P.W. 1 and her clerk, P.W. 3 and P.W. 4. P.W. 1 in her evidence states: "I have no recollection whether in this case lender handed over $2,500 to defendant, but in every case in which I acted I would not sign any document unless I was certain both parties understood its contents and the actual amount was paid by lender to borrower in my presence." In cross-examination she denied that only $2,000 was paid by plaintiff to defendant in her presence. According to P.W. 3, "The money is given in my presence to P.W. 1 who counted it. It was then handed over to defendant who counted it. $2,500 was handed over."

The defendant in his defence denied that he received $2,500. In his evidence defendant stated: "Plaintiff told me before going to Bannon & Bailey that I would get $2,000 but must sign for $2,500. P.W. 1 counted $2,000, gave it to me, *but I told her that I had already received $500 earlier which was not true.*" It appeared that P.W. 1 was never cross-examined on this part of the evidence. The defendant further stated that he had paid $2,000 to the plaintiff. He was supported by his clerk, D.W. 2 who tendered the account book and his cashier, D.W. 3 who said that for three or four months some payments were made to P.W. 4. P.W. 4 admitted that when plaintiff went to India in 1960, he was appointed his attorney but denied that he ever collected or received any money from defendant during plaintiff's absence in India.

In his judgment the learned trial Judge stated: "As to the capital, Miss Lim, her clerk P.W. 3 and the plaintiff P.W. 2 all stated that at Bannon & Bailey in fact $2,500, the amount stated in the document, was handed over to the defendant in Miss Lim's presence. She so certified in the promissory note P.I." He went on to say: "I do not think Miss Lim and her clerk lied to the Court. Having accepted P.W. 1's evidence as true," later in his judgment he had this to say: "But in my view it is quite probable that though $2,500 was in fact paid to the defendant in Miss Lim's presence, subsequent to the ceremony in her chambers, $500 of the capital must have been returned by the defendant to the plaintiff." With respect to the learned Judge I could find nothing on record to support this. On the contrary it was in conflict with the evidence of D.W. 1 that he had received only $2,000 from Miss Lim and that he had told her that he had received the $500 earlier.

In the case of *Vowles* v. *Armstrong-Siddeley Motors, Ltd.*[1] at page 802 MacKinnon L.J. states:—

"I confess I see no escape from the conclusion that the findings in favour of the plaintiff and those in favour of the defendant are mutually destructive. That being so, I do not think we can affirm the judgment for the defendants and equally we cannot accede to Mr. Doyle's appeal to us to enter judgment for the plaintiff. I think there must be an order for a new trial."

In view of the contradictory statements in the judgment of the learned trial Judge and on the authority of the above-mentioned case in my opinion there is no alternative but to allow the appeal and to send the case back for re-trial, costs to abide the result of the re-trial. I therefore make the order accordingly.

Appeal allowed.

Solicitors: *Bannon & Bailey; K. Chelvanayagam.*

LEE PIEW v. PUBLIC PROSECUTOR

[A. Cr. J. (Ong J.) January 15, 1963]

[K.L. — Criminal Appeal No. 66 of 1962]

Penal Code, s.186 — Obstructing public servant — Accused assisting suspect offender under s.29, Minor Offences Ordinance, 1955 — Obstructing police officer from taking possession of goods — Whether seizure of goods of suspect under s.29 before arrest lawful — Minor Offences Ordinance, 1955, ss.29 and 31.

A formal arrest is a condition precedent under section 31 of the Minor Offences Ordinance to seizure of property regarding which any offence was thought to have been committed under section 29 of the said Ordinance. A person commits no offence if prior to such arrest he merely resisted persuasion or offered obstruction to an irregular and improper exercise by any police officer of his powers.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

H. S. Ong (Deputy Public Prosecutor) for the respondent.

Ong J.: The appellant was convicted by the Magistrate at Kuala Selangor of having voluntarily obstructed a public servant, P.C.11930, in the discharge of his duty as such public servant, thereby committing an offence under section 186 of the Penal Code. He was sentenced to pay a fine of $20 or undergo imprisonment of one week. Against such conviction and sentence he has brought this appeal.

The facts are simple. The appellant was a householder living at 350 Hill Road, Ijok New Village. It seems to me quite clear, in the event, that he was a person whose possession of rubber sheets and scrap at the time in question was not a matter for any reasonable suspicion because otherwise he should already have been prosecuted under section 29(i) of the Minor Offences Ordinance, 1955 in respect of the rubber found within his premises and in his possession.

The appellant was jointly charged and tried with his nephew, Lee Kim Khee, under section 186. The latter has not appealed against his conviction or sentence. The police constable in question was off duty and in civilian clothes when at about 2 p.m. he saw the nephew carrying some rubber on the carrier of his bicycle along the main road. In an endeavour to verify his suspicions about the ownership of the rubber the constable followed Kim Khee to the house of the appellant. Outside that house there followed an alleged struggle between the constable and Kim Khee for possession of the rubber and it was further alleged that the appellant lent his assistance to Kim Khee in such struggle.

Now it is clear that the constable's suspicion against Kim Khee was that he had committed an offence under section 29 of the Minor Offences Ordinance, 1955. Section 31 of that Ordinance provides that "any police officer may arrest without warrant any person offending in his sight against any of the provisions of (*inter alia*) section 29" and the constable accordingly should have arrested Kim Khee in the manner prescribed by section 15 of the Criminal Procedure Code. Instead of doing so, however, he made no attempt whatsoever to arrest Kim Khee, but tried to seize and carry away rubber which was the property of this appellant. In preventing any other person from taking away his property without lawful authority the appellant was doing no more than he was entitled to do, since he had no means of knowing at the time under what colour of right or authority the constable was purporting to act as he did. The conviction is wrong, and I therefore set aside the conviction and sentence and order the fine to be repaid.

Having carefully perused the evidence on the record I am further satisfied that the conviction and sentence passed by the learned Magistrate on Lee Kim Khee, who has not appealed, should also not be allowed to stand. Rightly or wrongly, the constable should forthwith have arrested Kim Khee "for offending in his sight against the provisions of section 29." Then it would have been right and proper that